Calendar No. 528

100TH CONGRESS
2d Session

SENATE

REPORT
100-284

POLYGRAPH PROTECTION ACT OF 1987

FEBRUARY 11, 1988.—Ordered to be printed

Filed under authority of the order of the Senate of FEBRUARY 4 (legislative day, FEBRUARY 2), 1987

Mr. KENNEDY, from the Committee on Labor and Human Resources, submitted the following

REPORT

together with

MINORITY VIEWS

[To accompany S. 1904]

The Committee on Labor and Human Resources, to which was referred the bill (S. 1904), having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends the bill as amended by the substitute do pass.

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Calendar No. ____

100TH CONGRESS
2D SESSION

S. 1904

[Report No. 100-____]

IN THE SENATE OF THE UNITED STATES

DECEMBER 1 (legislative day, NOVEMBER 30), 1987

Mr. KENNEDY (for himself, Mr. HATCH, Mr. PELL, Mr. STAFFORD, Mr. MATSUNAGA, Mr. METZENBAUM, Mr. WEICKER, Mr. DODD, Mr. SIMON, Mr. HARKIN, Mr. ADAMS, and Ms. MIKULSKI) introduced the following bill; which was read twice and referred to the Committee on Labor and Human Resources

FEBRUARY ____ (legislative day, _____), 1988

Reported by Mr. KENNEDY , with an amendment

[Strike out all after the enacting clause and insert the part printed in italic]

A BILL

To strictly limit the use of lie detector examinations by employers involved in or affecting interstate commerce.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Polygraph Protection Act of 1987''.

SEC. 2. DEFINITIONS.

As used in this Act:

(1) COMMERCE.—The term ''commerce'' has the meaning provided by section 3(b) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(b)).

(2) EMPLOYER.—The term ''employer'' includes any person acting directly or indirectly in the interest of an employer in relation to an employee or prospective employee.

(3) LIE DETECTOR TEST.—The term ''lie detector test'' includes—

(A) any examination involving the use of any polygraph, deceptograph, voice stress analyzer, psychological stress evaluator, or any other similar device (whether mechanical, electrical, or chemical) that is used, or the results of which are used, for the purpose of rendering a diagnostic opinion regarding the honesty or dishonesty of an individual or for verifying the truth of statements; and

(B) the testing phases described in paragraphs (1), (2), and (3) of section 8(c).

(4) POLYGRAPH.—The term ''polygraph'' means an instrument that records continuously, visually, permanently, and simultaneously changes in the cardiovascular, respiratory, and electrodermal patterns as minimum instrumentation standards.

(5) RELEVANT QUESTION.—The term ''relevant question'' means any lie detector test question that pertains directly to the matter under investigation with respect to which the examinee is being tested.

(6) SECRETARY.—The term ''Secretary'' means the Secretary of Labor.

(7) TECHNICAL QUESTION.—The term ''technical question'' means any control, symptomatic, or neutral question that, although not relevant, is designed to be used as a measure against which relevant responses may be measured.

SEC. 3. PROHIBITIONS ON LIE DETECTOR USE.

Except as provided in section 7, it shall be unlawful for any employer engaged in commerce or in the production of goods for commerce—

(1) directly or indirectly, to require, request, suggest, or cause any employee or prospective employee to take or submit to any lie detector test;

(2) to use, accept, refer to, or inquire concerning the results of any lie detector test of any employee or prospective employee;

(3) to discharge, dismiss, discipline in any manner, or deny employment or promotion to, or threaten to take any such action against—

(A) any employee or prospective employee who refuses, declines, or fails to take or submit to any lie detector test; or

(B) any employee or prospective employee on the basis of the results of any lie detector test; or

(4) to discharge, discipline, or in any manner discriminate against an employee or prospective employee because—

(A) such employee or prospective employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act;

(B) such employee or prospective employee has testified or is about to testify in any such proceeding; or

(C) of the exercise by such employee, on behalf of such employee or another person, of any right afforded by this Act.

~~SEC. 4. NOTICE OF PROTECTION.~~

~~The Secretary shall prepare, have printed, and distribute a notice setting forth excerpts from, or summaries of, the pertinent provisions of this Act. Each employer shall post and maintain such notice, in conspicuous places on its premises where notices to employees and applicants to employment are customarily posted.~~

~~SEC. 5. AUTHORITY OF THE SECRETARY.~~

~~(a) IN GENERAL.—The Secretary shall—~~

~~(1) issue such rules and regulations as may be necessary or appropriate to carry out this Act;~~

~~(2) cooperate with regional, State, local, and other agencies, and cooperate with and furnish technical assistance to employers, labor organizations, and employment agencies to aid in effectuating the purposes of this Act; and~~

~~(3) make investigations and inspections and require the keeping of records necessary or appropriate for the administration of this Act.~~

~~(b) SUBPOENA AUTHORITY.—For the purpose of any hearing or investigation under this Act, the Secretary shall have the authority contained in sections 9 and 10 of the Federal Trade Commission Act (15 U.S.C. 49 and 50).~~

~~SEC. 6. ENFORCEMENT PROVISIONS.~~

~~(a) CIVIL PENALTIES.—~~

~~(1) IN GENERAL.—Subject to paragraph (2)—~~

(A) any employer who violates section 4 may be assessed a civil money penalty not to exceed $100 for each day of the violation; and

(B) any employer who violates any other provision of this Act may be assessed a civil penalty of not more than $10,000.

(2) DETERMINATION OF AMOUNT.—In determining the amount of any penalty under paragraph (1), the Secretary shall take into account the previous record of the person in terms of compliance with this Act and the gravity of the violation.

(3) COLLECTION.—Any civil penalty assessed under this subsection shall be collected in the same manner as is required by subsections (b) through (c) of section 503 of the Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C. 1853) with respect to civil penalties assessed under subsection (a) of such section.

(b) INJUNCTIVE ACTIONS BY THE SECRETARY.—The Secretary may bring an action to restrain violations of this Act. The district courts of the United States shall have jurisdiction, for cause shown, to issue temporary or permanent restraining orders and injunctions to require compliance with this Act.

(c) PRIVATE CIVIL ACTIONS.—

(1) LIABILITY.—An employer who violates this Act shall be liable to the employee or prospective employee affected by such violation. Such employer shall be liable for such legal or equitable relief as may be appropriate, including but not limited to employment, reinstatement, promotion, and the payment of lost wages and benefits.

(2) COURT.—An action to recover the liability prescribed in paragraph (1) may be maintained against the employer in any Federal or State court of competent jurisdiction by any one or more employees for or in behalf of himself or themselves and other employees similarly situated.

(3) COSTS.—The court shall award to a prevailing party in any action under this subsection the reasonable costs of such action, including attorneys' fees.

(d) WAIVER OF RIGHTS PROHIBITED.—The rights and procedures provided by this Act may not be waived by contract or otherwise, unless such waiver is part of a written settlement of a pending action or complaint, agreed to and signed by all the parties.

SEC. 7. EXEMPTIONS.

(a) NO APPLICATION TO GOVERNMENTAL EMPLOYERS.—The provisions of this Act shall not apply with re-

~~spect to the United States Government, a State or local government, or any political subdivision of a State or local government.~~

~~(b) NATIONAL DEFENSE AND SECURITY EXEMPTION.—~~

~~(1) NATIONAL DEFENSE.—Nothing in this Act shall be construed to prohibit the administration, in the performance of any counterintelligence function, of any lie detector test to—~~

~~(A) any expert or consultant under contract to the Department of Defense or any employee of any contractor of such Department; or~~

~~(B) any expert or consultant under contract with the Department of Energy in connection with the atomic energy defense activities of such Department or any employee of any contractor of such Department in connection with such activities.~~

~~(2) SECURITY.—Nothing in this Act shall be construed to prohibit the administration, in the performance of any intelligence or counterintelligence function, of any lie detector test to—~~

~~(A)(i) any individual employed by, or assigned or detailed to, the National Security Agency or the Central Intelligence Agency, (ii) any expert or consultant under contract to the~~

National Security Agency or the Central Intelligence Agency, (iii) any employee of a contractor of the National Security Agency or the Central Intelligence Agency, or (iv) any individual applying for a position in the National Security Agency or the Central Intelligence Agency; or

(B) any individual assigned to a space where sensitive cryptologic information is produced, processed, or stored for the National Security Agency or the Central Intelligence Agency.

(c) EXEMPTION FOR FBI CONTRACTORS.—Nothing in this Act shall be construed to prohibit the administration, in the performance of any counterintelligence function, of any lie detector test to an employee of a contractor of the Federal Bureau of Investigation of the Department of Justice who is engaged in the performance of any work under the contract with such Bureau.

(d) LIMITED EXEMPTION FOR ONGOING INVESTIGATIONS.—Subject to section 8, this Act shall not prohibit an employer from requesting an employee to submit to a polygraph test if—

(1) the test is administered in connection with an ongoing investigation involving economic loss or injury to the employer's business, including theft,

embezzlement, misappropriation, or an act of unlawful industrial espionage or sabotage;

(2) the employee had access to the property that is the subject of the investigation;

(3) the employer has a reasonable suspicion that the employee was involved in the incident or activity under investigation; and

(4) the employer—

(A) files a report of the incident or activity with the appropriate law enforcement agency;

(B) files a claim with respect to the incident or activity with the insurer of the employer, except that this subparagraph shall not apply to a self-insured employer;

(C) files a report of the incident or activity with the appropriate government regulatory agency; or

(D) executes a statement that—

(i) sets forth with particularity the specific incident or activity being investigated and the basis for testing particular employees;

(ii) is signed by a person (other than a polygraph examiner) authorized to legally bind the employer;

~~(iii) is provided to the employee on request;~~

~~(iv) is retained by the employer for at least 3 years; and~~

~~(v) contains at a minimum—~~

~~(I) an identification of the specific economic loss or injury to the business of the employer;~~

~~(II) a statement indicating that the employee had access to the property that is the subject of the investigation; and~~

~~(III) a statement describing the basis of the employer's reasonable suspicion that the employee was involved in the incident or activity under investigation.~~

~~SEC. 8. RESTRICTIONS ON USE OF EXEMPTIONS.~~

~~(a) OBLIGATION TO COMPLY WITH CERTAIN LAWS AND AGREEMENTS.—The limited exemption provided under section 7(d) shall not diminish an employer's obligation to comply with—~~

~~(1) applicable State and local law; and~~

~~(2) any negotiated collective bargaining agreement.~~

that limits or prohibits the use of lie detector tests on employees.

(b) TEST AS BASIS FOR ADVERSE EMPLOYMENT ACTION.—Such exemption shall not apply if an employee is discharged, dismissed, disciplined, or discriminated against in any manner on the basis of the results of one or more polygraph tests or the refusal to take a polygraph test, without additional supporting evidence. The evidence required by section 7(d) may serve as additional supporting evidence.

(c) RIGHTS OF EXAMINEE.—Such exemption shall not apply unless the requirements described in section 7 and paragraphs (1), (2), and (3) are met.

(1) PRETEST PHASE.—During the pretest phase, the prospective examinee—

(A) is provided with reasonable notice of the date, time, and location of the test, and of such examinee's right to obtain and consult with legal counsel or an employee representative throughout all phases of the test;

(B) is not subjected to harassing interrogation technique;

(C) is informed of the nature and characteristics of the tests and of the instruments involved;

(D) is informed as to whether—

(i) the testing area contains a two-way mirror, a camera, or any other device through which the test can be observed; or

(ii) any other device, including any device for recording or monitoring the conversation will be used;

(E) is informed of such examinee's privilege against self-incrimination under the Fifth Amendment of the Constitution of the United States;

(F) is provided an opportunity to review all questions (technical or relevant) to be asked during the test and is informed of the right to terminate the test at any time; and

(G) signs a notice informing such examinee of—

(i) the limitations imposed under this section;

(ii) the legal rights and remedies available to the examinee if the polygraph test is not conducted in accordance with this Act; and

(iii) the legal rights and remedies of the employer.

(2) ACTUAL TESTING PHASE.—During the actual testing phase—

(A) the examinee is not asked any questions by the examiner concerning—

(i) religious beliefs or affiliations;

(ii) beliefs or opinions regarding racial matters;

(iii) political beliefs or affiliations;

(iv) any matter relating to sexual behavior; and

(v) beliefs, affiliations, or opinions regarding unions or labor organizations;

(B) the examinee is permitted to terminate the test at any time;

(C) the examiner does not ask such examinee any question (technical or relevant) during the test that was not presented in writing for review to such examinee before the test;

(D) the examiner does not ask technical questions of the examinee in a manner that is designed to degrade, or needlessly intrude on, the examinee; and

(E) the examiner does not conduct a test on an examinee when there is written evidence by a physician that the examinee is suffering from

a ~~medical or psychological condition or undergoing treatment that might cause abnormal responses during the test.~~

~~(3) POST-TEST PHASE.—Before any adverse employment action, the employer must—~~

~~(A) further interview the examinee on the basis of the results of the test; and~~

~~(B) provide the examinee with—~~

~~(i) a written copy of any opinion or conclusion rendered as a result of the test; and~~

~~(ii) a copy of the questions asked during the test along with the corresponding charted responses.~~

~~(d) QUALIFICATIONS OF EXAMINER.—Such exemptions shall not apply unless the individual who conducts the polygraph test—~~

~~(1) is at least 21 years of age;~~

~~(2) is a citizen of the United States;~~

~~(3) is a person of good moral character;~~

~~(4) has complied with all required laws and regulations established by licensing and regulatory authorities in the State in which the test is to be conducted;~~

~~(5)(A) has successfully completed a formal training course regarding the use of polygraph tests that has been approved by the State in which the test is to be conducted or by the Secretary; and~~

~~(B) has completed a polygraph test internship of not less than 6 months duration under the direct supervision of an examiner who has met the requirements of this section;~~

~~(6) maintains a minimum of a $50,000 bond or an equivalent amount of professional liability coverage;~~

~~(7) uses an instrument that records continuously, visually, permanently, and simultaneously changes in the cardiovascular, respiratory, and electrodermal patterns as minimum instrumentation standards;~~

~~(8) bases an opinion of deception indicated on evaluation of changes in physiological activity or reactivity in the cardiovascular, respiratory, and electrodermal patterns on the lie detector charts;~~

~~(9) renders any opinion or conclusion regarding the test--~~

~~(A) in writing and solely on the basis of an analysis of the polygraph charts;~~

~~(B) that does not contain information other than admissions, information, case facts, and in-~~

terpretation of the charts relevant to the purpose and stated objectives of the test; and

(C) that does not include any recommendation concerning the employment of the examinee;

(10) does not conduct and complete more than five polygraph tests on the calendar day on which the test is given and does not conduct any such test for less than a 90-minute duration; and

(11) maintains all opinions, reports, charts, written questions, lists, and other records relating to the test for a minimum period of 3 years after administration of the test.

(c) PROMULGATION OF STANDARDS.—The Secretary shall establish standards governing individuals who, as of the date of the enactment of this Act, are qualified to conduct polygraph tests in accordance with applicable State law. Such standards shall not be satisfied merely because an individual has conducted a specific number of polygraph tests previously.

SEC. 9. DISCLOSURE OF INFORMATION.

(a) IN GENERAL.—A person, other than the examinee, may not disclose information obtained during a polygraph test, except as provided in this section.

(b) PERMITTED DISCLOSURES.—A polygraph examiner, polygraph trainee, or employee of a polygraph examiner may disclose information acquired from a polygraph test only to—

(1) the examinee or any other person specifically designated in writing by the examinee;

(2) the employer that requested the test; or

(3) any person or governmental agency that requested the test as authorized under subsection (a), (b), or (c) of section 7 or any other person, as required by due process of law, who obtained a warrant to obtain such information in a court of competent jurisdiction.

(c) DISCLOSURE BY EMPLOYER.—An employer (other than an employer covered under subsection (a), (b), or (c) of section 7) for whom a polygraph test is conducted may disclose information from the test only to a person described in subsection (b).

SEC. 10. EFFECT ON STATE LAW.

This Act shall not preempt any provision of any State law that is more restrictive with respect to the administration of lie detector tests than this Act.

~~SEC. 11. EFFECTIVE DATE.~~

~~(a) IN GENERAL.—Except as provided in subsection (b), this Act shall become effective 6 months after the date of enactment of this Act.~~

~~(b) REGULATIONS.—Not later than 120 days after the date of enactment of this Act, the Secretary shall issue such rules and regulations as may be necessary or appropriate to carry out this Act.~~

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Polygraph Protection Act of 1987''.

SEC. 2. DEFINITIONS.

As used in this Act:

(1) COMMERCE.—The term ''commerce'' has the meaning provided by section 3(b) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(b)).

(2) EMPLOYER.—The term ''employer'' includes any person acting directly or indirectly in the interest of an employer in relation to an employee or prospective employee.

(3) LIE DETECTOR TEST.—The term ''lie detector test'' includes—

(A) any examination involving the use of any polygraph, deceptograph, voice stress analyzer, psychological stress evaluator, or any other similar device (whether mechanical, elec-

trical, or chemical) that is used, or the results of which are used, for the purpose of rendering a diagnostic opinion regarding the honesty or dishonesty of an individual; and

(B) the testing phases described in paragraphs (1), (2), and (3) of section 8(c).

(4) POLYGRAPH.—The term ''polygraph'' means an instrument that records continuously, visually, permanently, and simultaneously changes in the cardiovascular, respiratory, and electrodermal patterns as minimum instrumentation standards.

(5) RELEVANT QUESTION.—The term ''relevant question'' means any lie detector test question that pertains directly to the matter under investigation with respect to which the examinee is being tested.

(6) SECRETARY.—The term ''Secretary'' means the Secretary of Labor.

(7) TECHNICAL QUESTION.—The term ''technical question'' means any control, symptomatic, or neutral question that, although not relevant, is designed to be used as a measure against which relevant responses may be measured.

SEC. 3. PROHIBITIONS ON LIE DETECTOR USE.

Except as provided in section 7, it shall be unlawful for any employer engaged in or affecting commerce or in the production of goods for commerce—

(1) directly or indirectly, to require, request, suggest, or cause any employee or prospective employee to take or submit to any lie detector test;

(2) to use, accept, refer to, or inquire concerning the results of any lie detector test of any employee or prospective employee;

(3) to discharge, dismiss, discipline in any manner, or deny employment or promotion to, or threaten to take any such action against—

(A) any employee or prospective employee who refuses, declines, or fails to take or submit to any lie detector test; or

(B) any employee or prospective employee on the basis of the results of any lie detector test; or

(4) to discharge, discipline, or in any manner discriminate against an employee or prospective employee because—

(A) such employee or prospective employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act;

(B) such employee or prospective employee has testified or is about to testify in any such proceeding; or

(C) of the exercise by such employee, on behalf of such employee or another person, of any right afforded by this Act.

SEC. 4. NOTICE OF PROTECTION.

The Secretary shall prepare, have printed, and distribute a notice setting forth excerpts from, or summaries of, the pertinent provisions of this Act. Each employer shall post and maintain such notice, in conspicuous places on its premises where notices to employees and applicants to employment are customarily posted.

SEC. 5. AUTHORITY OF THE SECRETARY.

(a) IN GENERAL.—The Secretary shall—

(1) issue such rules and regulations as may be necessary or appropriate to carry out this Act;

(2) cooperate with regional, State, local, and other agencies, and cooperate with and furnish technical assistance to employers, labor organizations, and employment agencies to aid in effectuating the purposes of this Act; and

(3) make investigations and inspections and require the keeping of records necessary or appropriate for the administration of this Act.

(b) SUBPOENA AUTHORITY.—For the purpose of any hearing or investigation under this Act, the Secretary shall have the authority contained in sections 9 and 10 of the Federal Trade Commission Act (15 U.S.C. 49 and 50).

SEC. 6. ENFORCEMENT PROVISIONS.

(a) CIVIL PENALTIES.—

(1) IN GENERAL.—Subject to paragraph (2)—

(A) any employer who violates section 4 may be assessed a civil money penalty not to exceed $100 for each day of the violation; and

(B) any employer who violates any other provision of this Act may be assessed a civil penalty of not more than $10,000.

(2) DETERMINATION OF AMOUNT.—In determining the amount of any penalty under paragraph (1), the Secretary shall take into account the previous record of the person in terms of compliance with this Act and the gravity of the violation.

(3) COLLECTION.—Any civil penalty assessed under this subsection shall be collected in the same manner as is required by subsections (b) through (e) of section 503 of the Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C. 1853) with respect to civil penalties assessed under subsection (a) of such section.

(b) INJUNCTIVE ACTIONS BY THE SECRETARY.—The Secretary may bring an action to restrain violations of this Act. The district courts of the United States shall have jurisdiction, for cause shown, to issue temporary or permanent restraining orders and injunctions to require compliance with this Act.

(c) PRIVATE CIVIL ACTIONS.—

(1) LIABILITY.—An employer who violates this Act shall be liable to the employee or prospective employee affected by such violation. Such employer shall be liable for such legal or equitable relief as may be appropriate, including but not limited to employment, reinstatement, promotion, and the payment of lost wages and benefits.

(2) COURT.—An action to recover the liability prescribed in paragraph (1) may be maintained against the employer in any Federal or State court of competent jurisdiction by any one or more employees for or in behalf of himself or themselves and other employees similarly situated.

(3) COSTS.—The court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(d) WAIVER OF RIGHTS PROHIBITED.—The rights and procedures provided by this Act may not be waived by contract or otherwise, unless such waiver is part of a written settlement of a pending action or complaint, agreed to and signed by all the parties.

SEC. 7. EXEMPTIONS.

(a) NO APPLICATION TO GOVERNMENTAL EMPLOYERS.—The provisions of this Act shall not apply with respect to the United States Government, a State or local government, or any political subdivision of a State or local government.

(b) NATIONAL DEFENSE AND SECURITY EXEMPTION.—

(1) NATIONAL DEFENSE.—Nothing in this Act shall be construed to prohibit the administration, in the performance of any counterintelligence function, of any lie detector test to—

(A) any expert or consultant under contract to the Department of Defense or any employee of any contractor of such Department; or

(B) any expert or consultant under contract with the Department of Energy in connection with the atomic energy defense activities of such Department or any employee of any contractor of such Department in connection with such activities.

(2) SECURITY.—Nothing in this Act shall be construed to prohibit the administration, in the performance of any intelligence or counterintelligence function, of any lie detector test to—

(A)(i) any individual employed by, or assigned or detailed to, the National Security Agency or the Central Intelligence Agency, (ii) any expert or consultant under contract to the National Security Agency or the Central Intelligence Agency, (iii) any employee of a contractor of the National Security Agency or the Central Intelligence Agency, or (iv) any individual applying for a position in the National Security Agency or the Central Intelligence Agency; or

(B) any individual assigned to a space where sensitive cryptologic information is produced, processed, or stored for the National Security Agency or the Central Intelligence Agency.

(c) EXEMPTION FOR FBI CONTRACTORS.—Nothing in this Act shall be construed to prohibit the administration, in the performance of any counterintelligence function, of any lie detector test to an employee of a contractor of the Federal Bureau of Investigation of the Department of Jus-

tice who is engaged in the performance of any work under the contract with such Bureau.

(d) LIMITED EXEMPTION FOR ONGOING INVESTIGATIONS.—Subject to section 8, this Act shall not prohibit an employer from requesting an employee to submit to a polygraph test if—

(1) the test is administered in connection with an ongoing investigation involving economic loss or injury to the employer's business, including theft, embezzlement, misappropriation, or an act of unlawful industrial espionage or sabotage;

(2) the employee had access to the property that is the subject of the investigation;

(3) the employer has a reasonable suspicion that the employee was involved in the incident or activity under investigation; and

(4) the employer—

(A) files a report of the incident or activity with the appropriate law enforcement agency;

(B) files a claim with respect to the incident or activity with the insurer of the employer, except that this subparagraph shall not apply to a self-insured employer;

(C) files a report of the incident or activity with the appropriate government regulatory agency; or

(D) executes a statement that—

(i) sets forth with particularity the specific incident or activity being investigated and the basis for testing particular employees;

(ii) is signed by a person (other than a polygraph examiner) authorized to legally bind the employer;

(iii) is provided to the employee on request;

(iv) is retained by the employer for at least 3 years; and

(v) contains at a minimum—

(I) an identification of the specific economic loss or injury to the business of the employer;

(II) a statement indicating that the employee had access to the property that is the subject of the investigation; and

(III) a statement describing the basis of the employer's reasonable

suspicion that the employee was involved in the incident or activity under investigation.

SEC. 8. RESTRICTIONS ON USE OF EXEMPTIONS.

(a) OBLIGATION TO COMPLY WITH CERTAIN LAWS AND AGREEMENTS.—The limited exemption provided under section 7(d) shall not diminish an employer's obligation to comply with—

(1) applicable State and local law; and

(2) any negotiated collective bargaining agreement,

that limits or prohibits the use of lie detector tests on employees.

(b) TEST AS BASIS FOR ADVERSE EMPLOYMENT ACTION.—Such exemption shall not apply if an employee is discharged, dismissed, disciplined, or discriminated against in any manner on the basis of the analysis of one or more polygraph tests or the refusal to take a polygraph test, without additional supporting evidence. The evidence required by section 7(d) may serve as additional supporting evidence.

(c) RIGHTS OF EXAMINEE.—Such exemption shall not apply unless the requirements described in section 7 and paragraphs (1), (2), and (3) are met.

(1) PRETEST PHASE.—During the pretest phase, the prospective examinee—

(A) is provided with reasonable notice of the date, time, and location of the test, and of such examinee's right to obtain and consult with legal counsel or an employee representative before each phase of the test;

(B) is not subjected to harassing interrogation technique;

(C) is informed of the nature and characteristics of the tests and of the instruments involved;

(D) is informed—

(i) whether the testing area contains a two-way mirror, a camera, or any other device through which the test can be observed;

(ii) whether any other device, including any device for recording or monitoring the conversation will be used; or

(iii) that the employer and the examinee, may with mutual knowledge, make a recording of the entire proceeding;

(E) is read and signs a written notice informing such examinee—

(i) that the examinee cannot be required to take the test as a condition of employment;

(ii) that any statement made during the test may constitute additional supporting evidence for the purposes of an adverse employment action described in section 8(b);

(iii) of the limitations imposed under this section;

(iv) of the legal rights and remedies available to the examinee if the polygraph test is not conducted in accordance with this Act; and

(v) of the legal rights and remedies of the employer; and

(F) is provided an opportunity to review all questions (technical or relevant) to be asked during the test and is informed of the right to terminate the test at any time; and

(G) signs a notice informing such examinee of—

(i) the limitations imposed under this section;

(ii) the legal rights and remedies available to the examinee if the polygraph test is not conducted in accordance with this Act; and

(iii) the legal rights and remedies of the employer.

(2) ACTUAL TESTING PHASE.—During the actual testing phase—

(A) the examinee is not asked any questions by the examiner concerning—

(i) religious beliefs or affiliations;

(ii) beliefs or opinions regarding racial matters;

(iii) political beliefs or affiliations;

(iv) any matter relating to sexual behavior; and

(v) beliefs, affiliations, or opinions regarding unions or labor organizations;

(B) the examinee is permitted to terminate the test at any time;

(C) the examiner does not ask such examinee any question (technical or relevant) during the test that was not presented in writing for review to such examinee before the test;

(D) the examiner does not ask technical questions of the examinee in a manner that is designed to degrade, or needlessly intrude on, the examinee;

(E) the examiner does not conduct a test on an examinee when there is written evidence by a physician that the examinee is suffering from a medical or psychological condition or undergoing treatment that might cause abnormal responses during the test; and

(F) the examiner does not conduct and complete more than five polygraph tests on a calendar day on which the test is given, and does not conduct any such test for less than a 90-minute duration.

(3) POST-TEST PHASE.—Before any adverse employment action, the employer must—

(A) further interview the examinee on the basis of the results of the test; and

(B) provide the examinee with—

(i) a written copy of any opinion or conclusion rendered as a result of the test; and

(ii) a copy of the questions asked during the test along with the corresponding charted responses.

(d) QUALIFICATIONS OF EXAMINER.—Such exemptions shall not apply unless the individual who conducts the polygraph test—

(1) is at least 21 years of age;

(2) has complied with all required laws and regulations established by licensing and regulatory authorities in the State in which the test is to be conducted;

(3)(A) has successfully completed a formal training course regarding the use of polygraph tests that has been approved by the State in which the test is to be conducted or by the Secretary; and

(B) has completed a polygraph test internship of not less than 6 months duration under the direct supervision of an examiner who has met the requirements of this section;

(4) maintains a minimum of a $50,000 bond or an equivalent amount of professional liability coverage;

(5) uses an instrument that records continuously, visually, permanently, and simultaneously changes in the cardiovascular, respiratory, and elec-

trodermal patterns as minimum instrumentation standards;

(6) bases an opinion of deception indicated on evaluation of changes in physiological activity or reactivity in the cardiovascular, respiratory, and electrodermal patterns on the lie detector charts;

(7) renders any opinion or conclusion regarding the test—

(A) in writing and solely on the basis of an analysis of the polygraph charts;

(B) that does not contain information other than admissions, information, case facts, and interpretation of the charts relevant to the purpose and stated objectives of the test; and

(C) that does not include any recommendation concerning the employment of the examinee; and

(8) maintains all opinions, reports, charts, written questions, lists, and other records relating to the test for a minimum period of 3 years after administration of the test.

(e) PROMULGATION OF STANDARDS.—The Secretary shall establish standards governing individuals who, as of the date of the enactment of this Act, are qualified to conduct polygraph tests in accordance with applicable State

law. Such standards shall not be satisfied merely because an individual has conducted a specific number of polygraph tests previously.

SEC. 9. DISCLOSURE OF INFORMATION.

(a) IN GENERAL.—A person, other than the examinee, may not disclose information obtained during a polygraph test, except as provided in this section.

(b) PERMITTED DISCLOSURES.—A polygraph examiner, polygraph trainee, or employee of a polygraph examiner may disclose information acquired from a polygraph test only to—

(1) the examinee or any other person specifically designated in writing by the examinee;

(2) the employer that requested the test; or

(3) any person or governmental agency that requested the test as authorized under subsection (a), (b), or (c) of section 7 or any other person, as required by due process of law, who obtained a warrant to obtain such information in a court of competent jurisdiction.

(c) DISCLOSURE BY EMPLOYER.—An employer (other than an employer covered under subsection (a), (b), or (c) of section 7) for whom a polygraph test is conducted may disclose information from the test only to a person described in subsection (b).

SEC. 10. EFFECT ON OTHER LAW AND AGREEMENTS.

This Act shall not preempt any provision of any State or local law, or any negotiated collective bargaining agreement, that is more restrictive with respect to the administration of lie detector tests than this Act.

SEC. 11. EFFECTIVE DATE.

(a) IN GENERAL.—Except as provided in subsection (b), this Act shall become effective 6 months after the date of enactment of this Act.

(b) REGULATIONS.—Not later than 120 days after the date of enactment of this Act, the Secretary shall issue such rules and regulations as may be necessary or appropriate to carry out this Act.

II. Summary of the Bill

S. 1904, the Polygraph Protection Act of 1987, combines the prohibition of certain types of lie-detector tests with standards limiting one type of polygraph test. Its purpose is to eliminate the denial of employment opportunities by prohibiting the least accurate yet more widely used lie-detector tests, preemployment and random examinations, and providing standards for and safeguards from abuse during tests not prohibited.

Except as provided elsewhere in the Act, an employer is prohibited from requiring, requesting, causing or suggesting any employee or applicant take a lie-detector test. An employer may not refer to the results of any such test, nor may an employer take adverse employment action against any employee or applicant who refuses, fails, files a complaint, testifies, or exercises any right granted under the Act.

The Secretary of Labor shall prepare and distribute a notice setting forth the rights and remedies of the Act, and employers must post such notices where customary.

The Secretary shall issue all necessary rules and regulations to carry out the Act, cooperate with federal, state and local agencies as well as other parties in effectuating the purposes of the Act. The Secretary shall also make all necessary investigations and inspections and require the keeping of records necessary for enforcing the Act. The Secretary shall have subpoena power for hearings and investigations under the Act.

An employer violating the Act is subject to civil penalty of up to $100 for each day of violation of the notice section, and up to $10,000 for violation of any other section. The Secretary may bring an action in federal district court to restrain violations of the Act.

An employer violating the Act also is liable to employees and applicants for appropriate legal and equitable relief in a federal or state court of competent jurisdiction, and the court may award the prevailing party reasonble costs, including attorney's fees.

Federal, state and local employers are not covered by the provisions of the Act, nor are private contractors to the Department of Defense, Department of Energy, National Security Agency, Central Intelligence Agency, and Federal Bureau of Investigation who are subject to intelligence or counterintelligence investigations regarding classified information and national security.

Polygraph examinations conducted by an employer as part of an ongoing investigation of an economic loss or injury are not prohibited by the Act, if certain prerequisites are met and careful standards followed. An employer may request an employee submit to an examination as part of an ongoing investigation of a specific economic loss when the employee had access to the property under investigation, the employer has a reasonable suspicion that the employee was involved in the incident, and the employer files a police report, insurance claim, report to a regulatory agency, or signs a statement detailing the specific loss, access, and describing the basis of the employer's reasonable suspicion that the employee was involved.

Once an employer has met these prerequisites and a request to submit to a polygraph examination would not violate state or local

law or any negotiated collective bargaining agreement, an employer may make such a request. No adverse employment action can be taken based on an analysis of polygraph test results or refusal to take such a test without additional supporting evidence. This prohibition does not preclude the use of confessions or statements made during the examination. The evidence required as a prerequisite to requesting a test may constitute the additional supporting evidence necessary for adverse employment action.

The employee must be provided with reasonable notice as to when and where the examination would take place, have opportunity to consult with counsel or an employee representative before each phase of the test, not be subjected to harassing interrogation technique, be informed of the nature and characteristics of the test and the instrument, be informed of any observation or recording of the test which is being utilized, and both the employer and the employee have the right with the other's knowledge to record the entire proceeding. The employee must also be read and sign a statement informing the employee the test is not required as a condition of continuing employment, that any statements made during the examination may serve as additional supporting evidence required for adverse employment action, of the limitations imposed under this section, of the employee's rights and remedies if the act is violated, and of the rights and remedies of the employer. The employee also shall be provided with an opportunity to review all questions which will be asked during the actual test, and be informed of the right to terminate the test at any time.

During the test, the employee may not be asked any questions dealing with religious beliefs or affiliations, racial matters, sexual behavior, political beliefs and affiliations, beliefs, or opinions regarding unions or labor organizations. The employee may: terminate the test at any time; not be asked any questions not reviewed in writing before the test; not be asked any technical questions designed to be degrading or needlessly intrusive; and not be subjected to a test when there is written evidence by a physician that the employee is suffering from a condition that might cause abnormal responses during the test. No test shall be less than 90 minutes in length, and no examiner may conduct more than five tests in one day.

Before any adverse employment action, the employee must be further interviewed on the basis of the test results, provided a written copy of any opinion or conclusion rendered as a result of the test, and a copy of the questions asked during the test along with the corresponding charted responses.

The examiner must meet minimal standards of conduct, competency, bonding, instrumentation, training, and recordkeeping. The information disclosed during an examination may not be disclosed to anyone other than the employee or the employee's designee, the employer requesting the test, government agencies authorized to conduct such tests or any other person as required by law who obtains a warrant to obtain such information.

The Act shall not preempt any provision of state or local law or negotiated collective bargaining agreement which is more restrictive with respect to lie detector tests. The Act shall become effective six months from the date of enactment. The Secretary of Labor

shall issue the necessary and appropriate rules and regulations within 120 days of date of enactment.

III. Background and Need for the Legislation

A. INTRODUCTION

The last decade has witnessed an explosive growth in "lie-detector" tests, particularly the polygraph test. Today over two million polygraph tests are administered annually. While the polygraph was originally developed as an adjunct to criminal investigations within the law enforcement community, the vast majority of tests today are used as a screening procedure in private sector employment. These screening tests, either preemployment or random post-employment, account for much of the recent increase in testing of employees, despite the growing consensus of the scientific community about the lack of scientific validity of these examinations. Testimony provided to the Committee by the American Medical Association concluded that the polygraph can provide evidence of deception or honesty in a percentage of people that is statistically only somewhat better than chance. Another witness calculated that a minimum of 400,000 honest workers are wrongfully labeled deceptive, and suffer adverse employment consequences each year.

B. ORIGIN AND NATURE OF THE TESTS

In 1895, an Italian criminologist first claimed lies could be detected through changes in a suspect's blood pressure. By the mid-1920's the basic components of the polygraph had been assembled and that technology remains essentially unchanged.

The standard polygraph has three components. First, a sphygmograph, wrapped around the upper arm, records changes in blood pressure. Second, two pneumograph tubes attached around the upper and lower chest record changes in respiration patterns. Third, two electrodes are attached to the index and second finger of one hand and record changes in the electrical conductivity, as measure by perspiration, of the skin.

Each of these instruments is connected to a pen register, and the physiological changes are recorded simultaneously on a chart. It is the analysis of this chart from which the examiner forms an opinion of honesty or dishonesty, an opinion drawn from the relative changes in these physiological responses to questions asked during the examination.

There is little debate over the ability of these components of the polygraph instrument to accurately register these physiological changes. But there is no evidence to support that these physiological changes recorded during an examination are unique to deception. Anger, fear, anxiety, surprise, shame, embarrassment and resentment are some of the psychological states which can cause identical changes. At best, the polygraph can claim to measure changes indicative of stress; but neither the machine nor the examiner can distinguish whether deception or another state of mind caused the stressed response with an acceptable degree of certainty.

Despite the popular perception that the machine is a "lie-detector," most experts agree that it is not. In addition to the charted responses, most examiners base their conclusion on the conduct of the examinee, the natural inclinations of the examiner, and on statements made during the examination. Confessions made during the examination are what many examiners claim as proof of the machine's validity. Many of the experts agree that fear of the machine is an essential element necessary to obtain confessions. One noted examiner claimed the polygraph to be "the best confession-getter since the cattle-prod." But it is this intentional use of fear and intimidation which disturbs many of the opponents of the test.

Private sector examination techniques

Most private sector pre-employment examinations utilize a series of relevant-irrelevant questions. A person is asked a series of questions which contain relevant information about the subject matter being tested, which are interspersed among a series of neutral questions. If the physiological reactions are stronger to the relevant questions than to the neutral ones, the person is diagnosed as being deceptive. Conversely, a lack of difference is considered to be an indication of truthfulness.

A second method, the control question technique, is the kind of test most generally used in criminal investigations or in instances which involve a reportable offense. Here, the control questions are deliberately vague, cover a long period of time and involve acts which almost everyone has committed at some time in his or her life. The purpose of this kind of exam is to force an individual to be more concerned with the control questions than with the relevant ones so that the latter will generate a physiological response. The questions are developed, reviewed and refined with the person taking the exam during a lengthy pretest interview.

The results of a control question test are evaluated by a numerical scoring system. If the reactions are stronger to the relevant questions, the individual is diagnosed as being deceptive. Conversely, stronger reactions to control questions are considered indicative of truthfulness.

While the available literature is more supportive of the control question technique than the relevant-irrelevant method, the former is not without its significant problems. Most notably, with a control question technique exam, the inevitable errors are almost always false positive findings. In such cases, an innocent examinee tests positive and is determined by the examiner to be deceptive, despite the fact that the examinee is actually telling the truth. It has been determined that even assuming an extraordinary 95% degree of accuracy with such tests, in every population of 1,000 examinees, 47 innocent people will be labeled guilty even though they are in fact innocent.

Unlike the control question test, which is based upon a specific issue or fact situation, the relevant-irrelevant test tends to be vague and broad, because the examiner is seeking to determine what an employee or prospective employee may do in the future. Also, these examinations are usually much shorter in duration than control question tests, and most experts agree that both fac-

tors significantly undercut the potential accuracy of the examination.

The Committee received no reports which indicated that the relevant-irrelevant test is an accurate indicator of deception. Instead, the existing data raises serious doubts about the validity of such tests. Commenting on this fact, the Office of Technology Assessment (OTA) stated in a report published in 1983 that "there is very little research or scientific evidence to establish polygraph test validity in large-scale screening as part of unauthorized disclosure investigations, or in personnel security screening situations, whether they be pre-employment, preclearance, periodic or aperiodic, random, or 'dragnet'." *(Scientific Validity of Polygraph Testing: A Research Review and Evaluation—A Technical Memorandum,* Washington, D.C.: U.S. Congress, Office of Technology Assessment, OTA-TM-H-15, November 1983, p. 102.)

Mr. F. Lee Bailey, a polygraph advocate of some renown, was asked during the Committee's hearing last Congress if the typical exam in the workplace, which is often no more than 15 minutes long, satisfied the requirements of a proper polygraph examination. Mr. Bailey replied that these exams were not polygraph tests, that to call them such was a misnomer. He went on to state that the questions in these short tests tend to be shotgun and provoke responses, the accuracy of which are beyond the examiner's ability to determine. In his view, a complete, responsible, expert polygraph exam would take a minimum of several hours to complete.

C. STATE AND FEDERAL RESPONSES

State regulation

The large increase in the use of polygraph tests in the private sector, and the resulting abuses and complaints have occurred despite an increase in restriction and regulation at the state level. Currently, nine states have no laws governing any aspect of employment polygraph testing, twelve states and the District of Columbia have laws which prohibit most private employers from requiring or requesting that a polygraph test be taken as a condition of employment, ten states prohibit most private employers from requiring an examination but allow employers to request such an exam, and the remaining states have enacted laws which either license polygraph examiners or regulate the use of polygraph examinations, and in some instances do both. The statutes and regulations in the states that allow polygraph examinations vary widely regarding the questions that may be asked, the rights of the employees who are tested, and the kind of training required for licensing.

Given the absence of uniform standards, it has been easy for employers and examiners to circumvent state restrictions. For example, applicants for work in a state which prohibits polygraph testing have been asked to submit to polygraph tests in a neighboring state that has more lenient standards. This is especially true in large metropolitan areas which have common borders with one or more states.

Furthermore, because of the variety of laws that exists, employees are often confused or ignorant as to the rights they may enjoy

in any given jurisdiction. For example, an applicant or employee of a company in the District of Columbia could not be asked to take a polygraph examination. If that same employee was "hired" in or "transferred" to a Virginia branch of the same chain, he or she could be fired for refusing an order or request to take an examination.

In Maryland, where an employee cannot be required to take an examination and there are no licensing requirements for polygraph examiners, the same employee could be asked questions which are prohibited in Virginia. These widely disparate circumstances could occur under existing state law at branch offices of the same business, and these branches could be within a ten-mile radius of one another.

The Committee heard testimony from an employer who operates in both Maryland and Virginia, who proudly stated they had never been found to violate the Maryland statute. Yet present at the hearing was a Maryland applicant to that employer who stated that upon applying as a saleman he was told he needed to take a polygraph. He declined, and was told he would be assigned to one of their Virginia stores where he would have to take the test. He took the test in Maryland with an examiner from Virginia.

Federal regulation

Under current law, there is no federal regulation of polygraph testing in the private sector except for those few employers who are involved in national security. Those regulations which do exit are extremely stringent and bear little resemblance, if any, to state regulation on polygraph testing.

The Department of Defense regulations have strict requirements on the qualifications of the examiners, the limited kinds of questions, and are used as a supplement to other forms of investigation, not as a substitute. All examinations are voluntary, and no one who refuses or fails can be fired. In fact, the regulations explicitly state they must be retained at equal pay and grade. Many of the provisions of S. 1904 are drawn from these regulations, although in most respects S. 1904 is less stringent.

Federal legislation

The private sector use and abuse of polygraphs has received congressional scrutiny since the mid 1960's. From the 93rd Congress through the 100th, almost 50 bills have been introduced to ban, restrict, or regulate this employment practice.

In the 99th Congress, the House of Representatives passed H.R. 1524, introduced by Representative Pat Williams. H.R. 1524 banned all uses for the polygraph in the private-sector, but exempted five industries from the ban.

S. 1815, introduced by Senator Orrin Hatch and Edward Kennedy was reported out of the Labor and Human Resources Committee. S. 1815 was also a total ban on private-sector testing, but contained no industry exemptions. The 99th Congress expired before the Senate could act on the reported legislation.

In the 100th Congress, the House of Representatives again passed a private-sector ban introduced by Representative Pat Williams (H.R. 1212), 254–158 on November 4, 1987. Two industries were

exempt from the ban. On December 1, 1987, Senators Kennedy, Hatch and ten other members of the Labor and Human Resources Committee introduced S. 1904. S. 1904 distinguishes between the type of test and their correlative validity, not between the type of industry in which it is used. S. 1904 bans the test where the evidence indicates a lack of validity to the procedure, and carefully regulates the test where the evidence indicates some validity. This balanced approach in S. 1904 has received widespread support from labor, civil liberties, and business groups.

Polygraph users which endorsed and support S. 1904 but opposed H.R. 1212 include: the American Association of Railroads; the American Bankers Association; the National Association of Convenience Stores; the National Grocer's Association; the National Mass Retailers Institute; the National Restaurant Association; the National Retail Merchant's Association; and the Securities Industry Association.

IV. Hearing

The Committee on Labor and Human Resources held a public hearing on June 19, 1987 on polygraphs in the workplace. The following persons and organizations appeared as witnesses and presented oral and written testimony:

The Honorable Robert Abrams, Attorney General, State of New York;

Mr. Ernest DuBester, Legislative Representative, AFL-CIO;

Dr. John S. Beary III, representing the American Medical Association;

Mr. William J. Scheve Jr., President, American Polygraph Association;

Mr. William Zierden, Vice-President of Circuit City Stores, on behalf of the U.S. Chamber of Commerce;

Mr. Richard C. Sullivan, Vice-President Consolidated Rail Corporation, on behalf of the American Association of Railroads.

The following persons and organizations provided written testimony for the record:

Mr. Stewart Acuff, Georgia State Employee Association;

American Pharmaceutical Association;

Mr. Thomas J. Donohue, President, American Trucking Associations;

Ms. Judy Goldberg, Legislative Representative, American Civil Liberties Union;

International Brotherhood of Electrical Workers;

Multi-Housing Laundry Association;

National Association of Showroom Merchandisers;

Floyd S. Perlman;

Securities Industry Association;

Mr. Donald T. Wilson, National Tire Dealers and Retreaders Association, Inc.;

Mr. William H. Wynn, International President, United Food and Commercial Workers and Mr. Robert F. Harbrant, President, Food & Allied Service Trades Department, AFL-CIO.

V. Committee Views

The Committee found the reliance placed upon the polygraph machine by private sector employers making employment decisions, in most situations, is misplaced and unwarranted. This is particularly true in the situations involving preemployment and random testing, where there is no scientific evidence of reliability, according to all the credible evidence presented to the Committee. The Committee found no credible study validating the accuracy of the typical examination being given in the private sector. The data suggests that 70% of tests administered are preemployment, another 15% of tests are post-employment random, and only 15% involve polygraph examinations as part of an investigation of a specific incident relating to the employer. Only in this last category did the Committee find some evidence of validity.

The Committee also found that many employers and polygraph examiners abuse and manipulate the examination process, and frequently use inaccurate or unfounded results to justify employment decisions which otherwise would be suspect. While this abuse is not true of all employers or examiners, it is sufficiently widespread to warrant congressional action. Employees and applicants are being unjustly terminated or denied employment not due to their own shortcomings but due to the intentional and unintentional misuse of the polygraph exam and due to the inherent inaccuracies of the most common testing processes.

The Committee also found the current patchwork quilt of state laws and regulations is incapable of curtailing abuse, and is frequently circumvented. State prohibitions and regulations often are not enforced, violators often go unpunished, and many victims of the current practices either have no adequate remedy or are unaware of their rights and remedies.

The Committee also found that businesses in states which have banned polygraphs entirely suffer no apparent disadvantage compared to their counterparts in states where testing is utilized. The Committee was presented with no evidence that losses due to employees was any higher in states with a total ban, compared to states in which testing is a common employment practice.

It is the Committee view that lie detector examinations with little or no evidence of validity should be totally prohibited, and those tests involving a specific incident, where there is some evidence of validity, should not be prohibited, but subject to careful restrictions and conditions upon their use. Such a legislative remedy is not only permissible under the Constitution, but consistent with the traditional role exercised by Congress over the last fifty years to protect the working men and women in this country.

The Committee found that business users of the polygraph made two plausible arguments in its favor. They claimed the threat of the examination acts as a deterrent to employees, and that the test can be useful in letting innocent employees "clear" themselves of wrongful accusations. Both uses are permissible under the provisions of S. 1904. Under the provisions of section 7(d), the threat of examination is present when there has been an incident of economic loss to the employer, and if such threat is a deterrent, it is preserved under the bill. Also under section 7(d), if the employer has a

reasonable suspicion an employee with access was involved in a specific incident of economic loss or injury to the employer, the employer may ask the employee to take a polygraph test. If the employee wishes to "clear" him or herself, that option is still available, although the data on false-positives of innocents wrongfully labeled deceptive suggest even in these circumstances the error rate is sufficiently high to warrant the further prohibition that employers not take adverse employment action based on the analysis of test results without additional supporting evidence.

The Committee intends the definition of lie detector to be broad, so as to encompass known devices marketed as possessing the capacity to distinguish honesty from dishonesty, as well as devices which might be marketed in the future as purported "lie detectors". S. 1904 totally bans use of all such devices by employers upon employees and prospective employees, and the limited specific incident exemption contained in section 7(d) is only for polygraph examinations, where there is some evidence of validity. This definitional distinction is not intended to be construed as encouragement or endorsement of such testing in employment by the Committee. Instead, the limited exemption for specific incident polygraph examination is a recognition that there is some evidence of validity in these limited circumstances, and a total ban is not warranted by existing scientific evidence.

The Committee does not intend this broad definition of lie detectors to be misconstrued so as to include medical tests used to determine the presence or absence of controlled substances or alcohol in bodily fluids. While these tests are "chemical" tests, they are not "lie detectors", and they are not addressed by this legislation. Likewise, while a telephone is a "mechanical" instrument and can be used to check information provided by an applicant or employee, it is an instrument of communication, not a "lie detector"; obviously its use is not addressed by this legislation.

While the Committee heard concerns raised about written psychological preemployment tests used by some employers, there have been few complaints about such tests, and little evidence of abuse. Such tests are not addressed by this legislation.

Exemptions

Section 7(a) provides the legislation does not apply in situations where a government is the employer, primarily because the Constitution does. Increasingly state and federal courts are finding the use of lie detectors on government employees violative of constitutional protections, which do not apply to private employees. For example, a recent unanimous Texas Supreme Court decision found a state agency's use of the polygraph "impermissibly violates privacy rights" protected by the constitution, protection which should yield only when the state can demonstrate that the intrusion is "reasonably warranted for the achievement of a compelling governmental objective that can only be achieved by no less intrusive, more reasonable means." (*Texas State Employees Union* v. *Texas Department of Mental Health and Retardation,* 31 Texas Supreme Court Journal 33 (October 28, 1987)). Such constitutional protections for public employees are not available to private employees, and the

Committee found the overwhelming evidence of abuse in the private sector.

Sections 7 (b) and (c) provide the legislation does not apply to contractors to several agencies who are subject to intelligence and counterintelligence investigations. The Committee found the exemption justified by the compelling governmental interest in national security, and further found that the regulations under which such examinations are administered to be extremely stringent, protective of the examinees, and the test results are only one part of an in-depth investigation, never relied on without corroborative evidence. These regulations are sufficiently protective of individuals that they form the basis for the provisions in section 8 of S. 1904, although in most instances the provisions in the Department of Defense regulations are more restrictive than those contained within section 8 of S. 1904.

Section 7(d) provides that private employers are not prohibited from requesting a polygraph examination when there has been a specific incident of economic loss or injury to the employer's business, and the predicate conditions are met. The rationale for this limited exemption is based on the fact that there is some scientific evidence of validity in this narrow use of the polygraph examination. This evidence, coupled with the other safeguards in the bill, should dramatically reduce the number of tests administered as well as the number of abuses.

The Committee intends the requirement in section 7(d)(1) of a specific economic loss or injury to the employer's business be narrowly construed. But there are specific incidents, such as check-kiting, money laundering, or the misappropriation of inside or confidential information which might actually result in gain to the employer in the short term, yet are specific incidents of employees which the employer should vigorously investigate. These types of incidents meet the requisite "injury" standard even though resulting in short-term gain, and an employer may request a polygraph examination for these types of specific incidents. Similarly, such instances as theft from property managed by an employer would meet the requisite standard.

The reference to "property" in section 7(d)(2) is to be specific property, but the Committee intends it to include such things of value as security codes and computer information.

The Committee intends that the term "reasonable suspicion" as employed in section 7(d)(3) refers to some observable articulable basis in fact in addition to the requirements set out in 7(d)(1) and (7)(d)(2) indicating the employee was involved in the incident or activity under investigation. This could include but is not limited to such factors as the demeanor of the employee, the totality of the circumstances surrounding his or her access to the property that is the subject of the investigation, and discrepancies of fact which arise during the course of the investigation.

It is the Committee view that S. 1904 as a whole, combining the prohibitions of the least accurate tests with the safeguards, rights, and remedies applicable to the specific incident tests not prohibited, will greatly reduce the loss of employment opportunity due to the current widespread use of lie detectors. While the standards contained in this legislation are not as stringent as those afforded

criminal suspects in our system of jurisprudence, they are far superior to the current employment framework, long overdue, and strike an appropriate balance between the interests of employees and the interests of employers.

VI. Cost Estimates

U.S. Congress,
Congressional Budget Office,
Washington, DC, February 3, 1988.

Hon. Edward M. Kennedy,
Chairman, Committee on Labor and Human Resources,
U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has prepared the attached cost estimate for S. 1904, the Polygraph Protection Act of 1987, as ordered reported by the Senate Committee on Labor and Human Resources on February 3, 1988.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

James L. Blum,
Acting Director.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

1. Bill number: S. 1904.
2. Bill title: Polygraph Protection Act of 1987.
3. Bill status: As ordered reported by the Senate Committee on Labor and Human Resources on February 3, 1988.
4. Bill purpose: To strictly limit the use of lie detector examinations by employers involved in or affecting interstate commerce.
5. Estimated cost to the Federal Government:

[By fiscal years, in millions of dollars]

	1988	1989	1990	1991	1992	1993
Estimated authorization level	1					
Estimated outlays	1					

Costs of this bill would fall within Function 600.

Basis of estimate: S. 1904 establishes new guidelines covering the use of lie detector examinations in the workplace. The bill would require the Department of Labor to notify all employers of these guidelines on the use of polygraph testing. Based on Internal Revenue Service Costs for notifying the 6.5 million employers of changes in the tax code, we estimate that enactment of this bill would increase costs at the Department of Labor by $1 million in fiscal year 1988.

While passage of this bill might lead to increased workload due to increased complaint investigations for the Wage and Hour Division within the Employment Standards Administration in the Department of Labor, we have no basis for estimating the magnitude of this increase.

6. Estimated cost to State and local government: We estimate that passage of S. 1904 would have no impact on the budgets of state and local governments.
7. Estimate comparison: None.
8. Previous CBO estimate: None.
9. Estimate prepared by: Michael Pogue.
10. Estimate approved by: C.G. Nuckols (for James L. Blum, Assistant Director for Budget Analysis).

VII. Regulatory Impact

In accordance with paragraph 11(b) of Rule XXVI of the Standing Rules of the Senate, the following statement of the regulatory impact of S. 1904 is made:

A. ESTIMATED NUMBER OF INDIVIDUALS AND BUSINESSES REGULATED AND THEIR GROUPS OR CLASSIFICATIONS

It is estimated that S. 1904 would regulate nearly every private business, their employees and job applicants. This number is approximately 5.7 million businesses and 94 million employees and job applicants. Those not regulated would be public sector employees and employees of DOD, DOE, NSA, CIA and FBI contractors with access to classified information and subject to counterintelligence investigations.

B. ECONOMIC IMPACT OF THE INDIVIDUALS, CONSUMERS, AND BUSINESSES AFFECTED

The bill would reduce the denial of employment opportunity due to erroneous test results. Estimates provided the Committee varied widely, but probably between 100,000 and 300,000 fewer individuals will be wrongfully denied employment opportunities solely due to the inaccuracy of the testing procedures. The Committee found no evidence that business losses were greater in states where the test is widely used compared to states in which the test is already banned, nor any related difference in consumer prices between these two classifications of states. Therefore the impact on consumers will be negligible. Businesses currently using the tests prohibited under the bill will have to find alternative screening criteria. Since some of the available alternatives are more expensive and some less expensive, the economic impact on the affected businesses will vary depending on the alternative selected by the business.

C. IMPACT OF THE ACT ON PERSONAL PRIVACY

The bill would eliminate the invasion of privacy inherent in the preemployment and random tests by prohibiting these tests entirely. The bill also affords privacy protections to the employees subject to tests not prohibited by this bill by proscribing certain classes of irrelevant personal questions.

D. ADDITIONAL PAPERWORK, TIME AND COSTS

The bill would result in some additional paperwork, time and costs to the Department of Labor, which would be entrusted with implementation and enforcement of this Act. Additional paperwork

and recordkeeping would be required under the Act for employers who meet the requirements of section 7(d) and who choose to conduct specific-incident tests.

VIII. Section-by-Section Analysis

SECTION 1—SHORT TITLE

Under section 1, the short title of S. 1904 is the Polygraph Protection Act of 1987.

SECTION 2—DEFINITIONS

Section 2(1) defines "commerce" by referencing the definition of commerce in section 3(b) of the Fair Labor Standards Act of 1938, i.e. "trade, commerce, transportation, transmission, or communication among the several states or between the states and any place outside thereof".

Section 2(2) defines "employer" to include any person acting directly or indirectly in the interest of an employer in relation to an employee or prospective employee.

Section 2(3) defines "lie-detector" to include any examination involving the use of any polygraph, deceptograph, voice stress analyzer, psychological stress evaluator or any similar device, whether mechanical, electrical, or chemical, used for the purpose of rendering a diagnostic opinion regarding honesty or dishonesty.

Section 2(4) defines "polygraph" as an instrument which records continuously, visually, permanently, and simultaneously changes in the cardiovascular, respiratory, and electrodermal patterns as minimum instrumentation standards.

Section 2(5) defines relevant question as any lie detector question that pertains directly to the matter under investigation with respect to which the examinee is being tested.

Section 2(6) defines "Secretary" as the Secretary of Labor.

Section 2(7) defines "technical question" as any control, symptomatic or neutral question that although not relevant, is designed to be used as a measure against which relevant responses may be measured.

SECTION 3—PROHIBITION ON LIE DETECTOR USE

Section 3 provides that except as provided in section 7, no employer may require, request, suggest, or cause any employee or applicant to take or submit to any lie detector. No employer may refer to the results of any such test, nor may an employer discharge, dismiss, discipline, deny employment or promotion to any employee or applicant, nor threaten any such action against anyone who refuses, fails, or exercises rights granted under the Act. Protected activities include the filing of a complaint or cause of action, testifying in such a proceeding, or the exercise of any right under the Act by the employee or on behalf of another person.

SECTION 4—NOTICE OF PROTECTION

Section 4 provides that the Secretary shall prepare, print and distribute a notice summarizing protections provided by the Act.

Each employer must post and maintain the notice in the place where such notices to employees are customarily posted.

SECTION 5—AUTHORITY OF THE SECRETARY

Section 5 authorizes the Secretary of Labor to issue all rules and regulations necessary to carry out the Act. The Secretary is also authorized to cooperate with and furnish technical assistance to other federal, state and local agencies, labor organizations, and employment agencies, and to make inspections, investigations, and require recordkeeping necessary for the administration of the Act. The Secretary shall have subpoena power for any hearing or investigation, as provided in 15 U.S.C 49 and 50.

SECTION 6—ENFORCEMENT PROVISIONS

Section 6(a) provides for civil penalties of up $100 per day for violation of the section 4 notice requirements, and up to $10,000 civil penalty violations of any other provision of the Act. In determining the amount of the penalty, the Secretary shall take into account the previous record of the violator, and the gravity of the offense. Civil penalties shall be collected in the same manner as subsections (b) through (e) section 503 of the Migrant and Seasonal Agricultural Worker Protection Act.

Section 6(b) grants the Secretary authority to bring an action in federal district court to restrain violations of the Act.

Section 6(c) provides for private civil actions by employees or applicants against employers who violate the Act, for appropriate legal or equitable relief in any federal or state court of competent jurisdiction. The court has the discretion to award costs and attorney's fees to the prevailing party in such an action.

Section 6(d) prohibits waiver of the rights and procedures granted under the Act, except as part of an agreement signed by the parties settling a pending action or complaint.

SECTION 7—EXEMPTIONS

Section 7(a) provides that the Act does not apply to the United States Government, state or local governments or political subdivisions thereof.

Section 7(b)(1) provides that the Act does not prohibit counterintelligence tests to contractors of the Defense Department or the Department of Energy in connection with atomic energy defense activities.

Section 7(b)(2) provides that the Act does not prohibit tests in connection with intelligence or counterintelligence investigations conducted by the National Security Agency or the Central Intelligence Agency upon applicants, individuals employed by or assigned to those agencies, experts, consultants, or their employees under contract to those agencies, or individuals with access to sensitive cryptologic information for these agencies.

Section 7(c) provides that the Act does not prohibit tests as part of a counterintelligence function of any employee of a contractor to the Federal Bureau of Investigation.

Section 7(d) provides that the Act does not prohibit an employer, subject to the provisions of Section 8, from requesting an employee

to submit to a provision test when it is administered as part of an ongoing investigation involving economic loss or injury to the employee's business. The employee must have had access to the property which is the subject of the investigation, and the employer must have a reasonable suspicion that the employee was involved in the incident or activity. The employer also must have filed a report of the incident to the appropriate law enforcement agency, an insurance claim (except in the case of a self-insured employer), a report to an appropriate government agency, or executed a signed statement setting forth with particularity the specific incident being investigated which is available to the employee upon request, and is retained by the employer for at least three years. Such statement shall at a minimum contain an identification of the specific economic loss or injury, a statement that the employee had access to that property, and a statement describing the basis for the employers' reasonable suspicion that the employee was involved in the incident or activity under investigation.

SECTION 8—RESTRICTIONS ON USE OF EXEMPTIONS

Section 8(a) provides that the limited exemption under 7(d) shall not diminish an employer's obligation to comply with applicable state and local law and any negotiated collective bargaining agreement that limits or prohibits the use of lie detector tests on employees.

Section 8(b) provides the limited exemption shall not apply if an employee is discharged, dismissed, disciplined or discriminated against in any manner on the basis of an analysis of test results or the refusal to take the test, without additional supporting evidence. The evidence required by section 7(d) to request the test may serve as the requisite additional supporting evidence.

Section 8(c) further provides that the limited exemption shall not apply unless certain rights of the examinee are complied with.

Section 8(c)(1) provides that during the pre-test phase, the prospective examinee is provided reasonable notice of the date, time and location of the test, and of the right of the examinee to obtain and consult with legal counsel or an employee representative before each phase of the test. The examinee shall not be subjected to harassing interrogation technique, and shall be informed of the nature and characteristics of the test and instrument. The examinee shall also be informed as to whether the testing area contains a two-way mirror, camera, or other observation device, whether any other device for recording or monitoring the conversation will be used, and that both the employer and the examinee have a right to record the test with the other party's knowledge. The examinee shall also be read and sign a statement informing the examinee: that the test cannot be required as a condition of continued employment, although a refusal to take such a test may result in adverse employment action if the employer has satisfied all other provisions of the Act; that any statement made during the test may constitute additional supporting evidence for the purposes of adverse employment action; of the limitation imposed under this section; of the legal rights and remedies available if the test if not

conducted in accordance with the Act; and the legal rights and remedies of the employer.

Section 8(c)(2) provides that during the actual testing phase, the examinee shall not be asked any questions by the examiner concerning religion, racial matters, politics, sexual behavior, or labor organizations. The examinee shall be permitted to terminate the test at any time. The examiner shall not ask any question that was not presented in writing for review prior to the test, nor ask any technical questions designed to degrade or needlessly intrude on the examinee. The examiner may not conduct a test where there is written evidence by a physician that the examinee is suffering from a medical or psychological condition or undergoing treatment that might cause abnormal responses during the test. The examiner may not conduct more than five tests per day, nor may any examination be less than 90 minutes in duration.

Section 8(c)(3) provides that before any adverse employment action, the employer must further interview the examinee on the basis of the results of the test, and provide the examinee with a written copy of the opinion or conclusion rendered as a result of the test, as well as a copy of the questions asked during the test along with the corresponding charted responses.

Sections 8(d) provides that the limited exemption shall not apply unless the examiner meets certain requirements. These include requirements that the examiner be at least 21 years of age, has complied with all required laws and regulations of the state in which the test is to be conducted, has successfully completed a formal training course regarding the use of polygraph tests approved by the state in which the test is to be conducted or by the Secretary, and has successfully completed an internship of not less than six months duration under the direct supervision of an examiner who has met the requirements of this section. The examiner must maintain a minimum of a $50,000 bond or an equivalent amount of liability coverage, and must use an instrument which records certain physiological responses as minimum instrumentation standards. The examiner must base an opinion of deception on these physiological changes, and render any opinion or conclusion regarding honesty or dishonesty in writing and solely on the basis of the charts. Any written report shall not contain information other than admissions, information, case facts, and interpretation of the charts relevant to the purpose of the test, and shall not include any recommendation concerning the employment of the examinee. The examiner must maintain all opinions, reports, charts, lists and other records relating to the test for a minimum period of three years.

Section 8(e) provides that the Secretary shall establish standards governing individuals who are qualified to conduct polygraph tests in accordance with applicable state law.

SECTION 9—DISCLOSURE OF INFORMATION

Section 9 limits disclosure of information obtained during the examination to the examinee or a person designated by the examinee, the employer who lawfully requested the test, or any person who obtains a warrant for such information from a court of compe-

tent jurisdiction. The employer requesting the test under section 7(d) may only disclose the test results to parties enumerated in this section.

SECTION 10—EFFECT ON STATE LAW

Section 10 provides that this Act does not preempt any state or local law or collective bargaining agreement that is more restrictive with respect to the lie detector tests than this Act.

SECTION 11—EFFECTIVE DATE

Section 10 provides that this Act becomes effective six months from date of enactment, and that the regulations to be issued by the Secretary shall be issued no later than 120 days after date of enactment.

IX. Changes in Existing Law

In accordance with paragraph 12 of Rule XXVI of the Standing Rules of the Senate, it is noted that S. 1904 is a free-standing bill and makes no changes in existing Federal law.

X. Committee Action

The Committee on Labor and Human Resources met on February 3, 1988 to consider S. 1904, the Polygraph Protection Act of 1987.

The Committee considered and adopted an amendment in the nature of a substitute offered by Chairman Kennedy and Senator Hatch, by voice vote.

The Committee considered a motion to favorably report the bill as amended by the substitute. By roll call vote of 13 to 3, the Committe agreed to the motion.

YEAS	NAYS
Kennedy	Quayle
Pell	Thurmond
Metzenbaum	Cochran
Matsunaga	
Dodd	
Simon	
Harkin	
Adams	
Mikulski	
Hatch	
Stafford	
Weicker	
Humphrey	

XI. Minority Views

MINORITY VIEWS OF MR. QUAYLE ON S. 1904, THE POLYGRAPH PROTECTION ACT OF 1987

S. 1904, would set federal standards for use of the polygraph device by employers. I am opposed to this bill, not because I have any belief in the validity of the polygraph, but because it would create a new intrusion of Federal law into the employment relationship. Up to now, Federal law has not regulated the employer's hiring and firing decision, except to prohibit unlawful discrimination.

Currently, labor-management agreements and state laws regulate hiring and firing decisions. The states have passed volumes of laws regulating the employment process, both through specific enactments against particular abuses and through statute and case law requirements of "just cause" for discharge.

I am somewhat surprised at the reasoning of the report of the majority which states:

> Employees and applicants are being unjustly terminated or denied employment not due to their own shortcomings but due to the intention and unintentional misuse of the polygraph exam and due to the inherent inaccuracies of the most common testing processes.

This statement implies that even the most common testing processes have inherent inaccuracies and leads me to believe that other tests will shortly be banned simply because they are imperfect.

Further, the report states:

> While the Committee heard concerns raised about written psyschological preemployment tests used by some employers, there have been few complaints about such tests, and little evidence of abuse.

If this Committee considered federal legislation every time there were an abuse in hiring and firing practices, we would find ourselves obsessed with every detail of employment now subject to state regulation or collective bargaining decision. I also find it odd in the extreme that "psychological preemployment tests" are found to be nonabusive or reliable simply because the sponsors have not heard complaints about those tests. I am certain they could find statements enough, if they looked.

Collective bargaining agreements are replete with clauses on these matters—including prohibitions and limitations on the use of the polygraph. For example, the Master Freight Agreement which the Teamsters have negotiated with trucking employers already permits the use of polygraphs in pre-employment screening, but not after the employee is hired.

It is bad public policy for the federal government to enter this new arena. The rationale given for this legislation is that employers make many unfair decisions based on the polygraph exam. I agree that the polygraph leads to many unfair decisions—but I do not agree that federal law is the answer to all mistakes that are made. If the polygraph is unfair, what about the personality test? What about the personal reaction which probably governs most hiring decisions? What about paper and pencil honesty tests? What about evaluations by psychologists? We will be closing our eyes to reality if we believe that federal supervision of the hiring and firing process will improve their quality. The federal government makes mistakes just as often as the private sector.

S. 1904 also crosses another new boundary—it requires federal licensing of polygraphers. I hope I do not need to remind my colleagues that currently the states license occupations whether it be the license of a surgeon or a barber. Proponents of this legislation have argued that abuses by polygraphers are so egregious that an overriding federal law is needed to ameliorate the shortcomings of state law.

For example, the Washington Post recently ran a series of articles on physicians in the State of Maryland who had been convicted of criminal offenses, but who nevertheless had not had their license to practice medicine revoked. Does this clear abuse of the licensing system and risk of public safety mean that the federal government should establish licensing standards for physicians?

S. 1904 contains an interesting double standard in the use of the polygraph. This bill is based on the conclusion that the polygraph is an unreliable device for screening employees and therefore, it should be banned for use by employers in the vast majority of cases—*except* where screening is important.

Thus, certain government contractors are exempted from the provisions of the bill. For them, the polygraph is reliable, but the very same device, in the hands of the same polygrapher, is unreliable for other employers with less important needs for screening. Consultants under contract to the Department of Defense, the National Security Agency, the Central Intelligence Agency or anyone who is "assigned to a space where . . . information is produced, processed, or stored" for NSA or the CIA, may polygraph when they wish, and whomever they wish. Contractors for the FBI are exempted and may polygraph their employees at anytime during their career and for any reason.

Why is the polygraph reliable for them, but not for Department of Transportation contractors supplying airport anti-terrorist and security services? Why is the polygraph device reliable for certain DOD contractors, but not for drug wholesalers and manufacturers?

In conclusion, I believe that S. 1904 represents a valiant effort to eradicate the abuses associated with the polygraph test in the workplace. Unfortunately, good intentions are not enough to accomplish this goal when coupled with a bill such as this. As I have pointed out, S. 1904 will merely compound the initial problem by further involving the federal government in an area best left to the private domain or as the continued prerogative of the States.

DAN QUAYLE.

MINORITY VIEWS OF MR. THURMOND ON THE POLYGRAPH PROTECTION ACT, S. 1904

I know that many members of this body are concerned about the potential for polygraph abuse. Many have heard tragic stories about innocent employees who lost their jobs because they failed polygraph tests. There certainly is the possibility that examiners could use the tests to ask inappropriate or embarrassing questions to examinees. We don't want to see these things happen and, in fact, want to see such practices stopped when and if they do occur.

However, the question I ask is whether the Congress of the United States is the appropriate legislative forum for addressing these questions. As I have said during meetings of the Senate Labor Committee, I strongly believe it is not. I believe that the Constitution of the United States clearly grants jurisdiction over this issue to the states. Moreover, the states have proven they are much better equipped to deal with the complexities of this issue and to develop the best legislation to meet the needs of their citizenry than the Congress.

I am deeply devoted to the principle of federalism. This is the fundamental issue before us today. We may differ on whether the polygraph works. We may disagree on whether use of the polygraph should be allowed in the public sector and denied to the private sector. Moreover, we may disagree on the best way to protect the rights of individual citizens who are asked to take polygraph examinations.

However, I don't believe we can disagree on whether we should be guided by the Constitution, and in particular the principles of the Tenth Amendment to the Constitution, in our deliberations about new legislation.

One of the axioms of American constitutional law is that Congress has only powers that are delegated to it by the Constitution, or reasonably implied from those so delegated.

I fear we have a tendency to disregard this principle that was so central to the preservation of individual liberty and to preventing the consolidation of overwhelming governmental power.

The delegates to the Constitutional Convention were well aware of the abuses which flowed from the absolute coalescence of power in one governmental authority. Fresh from their experience with tyranny, they conceived a government of limited and delegated powers.

Their prime concern was that the people maintain their sovereignty. In order to accomplish that, power was first divided between the people and the government, reserving to the people the control of the power allotted to the government. This power was then divided between the federal and state governments. These parts, in turn, were split up among the coordinate legislative, executive, and judicial bodies.

Through these safeguards, they believed they would be able to prevent a highly centralized government which historically has been fatal to civil liberty.

According to Thomas Jefferson, limiting government to its proper sphere was the very essence of republican government; and an important element was assuring strong and viable local governmental authorities. To Jefferson, local governments were closer to the people, and consequently, more safely trusted than the national government.

I speak out about federalism so often because I believe firmly this is a central principle in maintaining a whole system designed to secure limited government and individual liberty.

The wisdom of the Framers is evident today through the application of their arguments to the issues before us. The principles of federalism are not just abstract concepts. I believe we are much more likely to get a more precise body of polygraph law that is much more responsive to the needs of our citizenry if the law is developed on a state-by-state basis.

The states are actively engaged in assuming this responsibility. Thirty-two of the 50 states have some kind of licensure or certification requirements for polygraph examiners. Forty-four of the 50 states have laws governing the use of the polygraph in the workplace; and 33 of the 50 states have addressed this issue legislatively since 1980.

STATE-BY-STATE ANALYSIS

For example, the state of Massachusetts addressed this issue as recently as 1982. The law bans most polygraph testing and requires polygraph examiners in private practice to be licensed.

Utah has required polygraph examiners to be licensed since legislation was passed in 1973.

The laws in the home states of the other members of this body reflect the richness and diversity of law that our states are developing.

Alabama has required since 1975 for a polygraph examiner to be licensed. This law was revised as recently as 1983.

In Arkansas an examinee must be told the test is voluntary and state licensing is required.

Florida requires a state license. Georgia requires questions to be provided in advance in writing, and prohibits questions on race, religion or politics.

Louisiana has a license requirement, as well as Mississippi.

New Mexico prohibits questions on sexual affairs, race, creed, religion, union affiliations or activity unless agreed to by written consent. Virginia requires a license and prohibits questions similar to those prohibited by New Mexico.

As I have already mentioned, 44 states have laws governing the use of polygraphs in the workplace. I urge my colleagues to examine the law of their respective states before voting on this issue.

STATES SHOW "COMPETENCE"

I believe that this chronicle of state law presents the case more effectively than any argument I can make of the states' ability and

willingness to regulate or ban the administration of polygraph tests. Only the states have the power and the ability to develop a body of polygraph law that will address the many complexities this issue presents. If polygraph abuse is a problem in one state, then that state has the option of outlawing its use there. But other states may find that it is a tool that is being used responsibly and that it is contributing to the stability of the companies operating there. If so, those states have the option of regulating it to protect citizens from abuse, as so many have done.

S. 1904 completely undermines the solutions fashioned, through their legislative process, by the people of these and other states. When the federal government threatens to overrule the states on issues that are clearly in their purview, it is no surprise that some are hesitant to tackle tough questions if they fear it will be negated by unnecessary federal intervention.

The legislation that we are considering here today would have far reaching and sweeping affects on American businesses, on employees and prospective employees, and on the body of polygraph law that is being developed by the states. Before we take such a major step, I believe we are obligated to develop a much more substantial hearing record than we have so far. There are many states in the union who feel that regulation, and not prohibition, is the key to protecting our citizens. I believe we need to learn much more about the successes and failures of the states' experience with regulation and bans on polygraph testing.

We would need to have good reason to strip polygraph regulation from the purview of the states, especially since they have developed a significant body of law already on this issue.

It traditionally is the purview of the states to regulate commerce within their boundaries. They have mechanisms to certify that those who deliver health care services to residents are qualified to do so. They oversee insurance and real estate brokers, utility companies, doctors, lawyers, and dentists, to name just a few.

The states are equipped to regulate the services offered by polygraph examiners as well.

Besides existing state law, other mechanisms are in place to address the issue of polygraph abuse in the private sector: namely, the collective bargaining process and the courts.

The courts provide an appropriate forum for redress for any citizen who feels his or her rights have been violated.

American workers have additional protection from polygraph abuse through the collective bargaining process. Mr. William Wynn of the United Food and Commercial Workers Union has said that 90 percent of the union's collective bargaining agreements prohibit polygraph testing.

Labor and management have the tools to find their own solutions in conjunction with existng state law on polygraph testing. This system allows even more fine tuning than state law alone.

I recognize that there may be abuses in the polygraph industry, and I urge the industry and the states to correct these deficiencies. However, under our Constitutional system, not every problem has a federal solution. If a federal solution is desired, but not Constitutionally available, then there is a provision for amending the Constitution wherein these additional powers can be granted.

In conclusion, I would like to make just one further point that I believe further emphasized the wisdom of our Constitution in reserving authority to our states.

If S. 1904 were to pass, it would establish a double standard in which the public sector would be allowed to use the polygraph for employee screening and incident investigation. However, the private sector would be much more limited in its use of the polygraph. How would we explain that to our constituents?

The federal government, and especially its national security agencies, apparently feel they need access to the polygraph to conduct their business, and they have access to it. Whether individual citizens or businesses need the polygraph to conduct their business is not a matter for the federal government but rather one for the states to decide. If the states decide it is not in their citizens' best interest to allow use of the polygraph, then they can outlaw it. That ban would not set up the national double-standard that S. 1904 would perpetuate.

I urge my colleagues to consider these issues during the debate today. Perhaps the Constitutional question is abstract and not pertinent to contemporary political concerns. However, the Senate of the United States has a solemn obligation to uphold the Constitution of the United States. This legislation, in my opinion, violates that obligation. I urge my colleagues to join with me in opposing S. 1904 and allowing our states to continue to do their job in exploring and debating this issue and developing their own body of legislation.

STROM THURMOND.

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